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ABSTRACT

This paper argues that without affirmative action, integration of American higher education would halt and resegregation would accelerate with each generation. The first section of the paper is an annotated bibliography of affirmative action in higher education; it cites books, articles and monographs, and two Web sites. The second section of the paper reviews the legal principles of affirmative action, offering quotations and legal citations from many sources to define the terms "strict scrutiny," compelling institutional interest, and "narrowly tailored." It concludes that student-body diversity may be the only avenue that can withstand judicial assault but warns that such a policy must be narrowly tailored. A third section examines the gradual erosion of the diversity rationale during the 1990s, citing court attacks on affirmative action, including Hopwood v. Texas; California's Proposition 209; and rulings in Texas and other states. It concludes that institutions must offer compelling evidence that diversity is essential to the achievement of higher education's mission. The next section examines some recent books and student surveys that support an affirmative action and examines the question of whether there is an effective surrogate for race, concluding that only through affirmative action can adequate services be provided to minority communities. (CH)

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THE COMPELLING NEED FOR RESEARCH ON THE BENEFITS OF RACIAL DIVERSITY IN HIGHER EDUCATION
And What Will Happen If Higher Education Fails to Make the Case for Diversity

An Outline of Remarks Delivered to the American Association for Higher Education's 2000 National Conference on Higher Education
Anaheim, California
March 31, 2000

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A. A BRIEF BIBLIOGRAPHY ON AFFIRMATIVE ACTION IN HIGHER EDUCATION

Recent Books on Affirmative Action in Higher Education:

Bowen, William & Bok, Derek, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998). A book that significantly changed the social and legal debate over affirmative action when it was published almost two years ago, the Bowen-Bok book reports on the results of a thirty-year longitudinal study of minority matriculants at elite colleges and universities. A carefully researched, meticulously reasoned case for the continued value of racial diversity in college and university admissions. The book is discussed in greater length on pages 19-21 of this outline, below.

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Caplan, Lincoln, UP AGAINST THE LAW: AFFIRMATIVE ACTION AND THE SUPREME COURT (1997). This short (73-page) book by a leading legal correspondent analyses the last twenty years' worth of Supreme Court decisions on affirmative action. The book starts with the 1978 *Bakke* ruling and ends with the Court's refusal to hear the *Hopwood* appeal in 1996. An excellent introduction for non-lawyers to the legal terminology of affirmative action jurisprudence.

Orfield, Gary & Miller, Edward, CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES (1998). A collection of essays on affirmative action in the post-*Hopwood* era. They focus on educators' reactions to anti-affirmative-action developments in Texas and California and the search for workable alternatives to affirmative action.

Recent Articles, Monographs, and Book Chapters:

Association of American Colleges and Universities, *The Impact of Diversity on Students: A Preliminary Review of the Research Literature* (edited by Morgan Appel, David Cartwright, Daryl G. Smith & Lisa E. Wolf, 1996). Copies can be ordered from AAC&U, Publications Desk, 1818 R Street, N.W., Washington, D.C. 20009, (202) 387-3760, ext. 404. A Ford-Foundation-funded survey of contemporary scholarship on the relationship between diversity initiatives and the quality of undergraduate education.

Association of Governing Boards of Universities and Colleges, *Affirmative Action: Few Easy Answers* (written by Martin Michaelson, 1996). Copies can be ordered from AGB, One Dupont Circle, N.W., Suite 400, Washington, D.C. 20036, (202) 296-8400. An accessible treatment of recent developments in affirmative action law, with usefully displayed data and a good bibliography.

Fetter, Jean H., Chapter 5 ("Affirmative Action") in QUESTIONS AND ADMISSIONS: REFLECTIONS ON 100,000 ADMISSIONS DECISIONS AT STANFORD (1995). Written by the long-time Dean of Undergraduate Admissions at one of the nation's most selective universities, this book in its chapter on affirmative action systematically analyses the most provocative points made by proponents and opponents of affirmative action in higher education. An excellent introduction to the difficult philosophical and policy questions at the heart of the contemporary debate on affirmative action in admissions.

Two Extraordinary Web Sites:

The Civil Rights Project, Harvard University (www.law.harvard.edu/civilrights). Professor Gary Orfield is one of the nation's leading scholars on equal opportunity in elementary, secondary, and post-secondary education. His Civil

Rights Project has published several books, monographs, and statistical studies on school desegregation and related subjects. The Project just completed a pathbreaking study of diversity in law schools. The study -- *Diversity and Legal Education: Student Experiences in Leading Law Schools* – is reproduced at www.law.harvard.edu/civilrights/publications/lawsurvey.html.

University of Michigan, *Information on Admissions Lawsuits* (www.umich.edu/~urel/admissions). The University of Michigan is the defendant in two pending lawsuits challenging affirmative action programs (one for undergraduate admission and one for admission to law school). The university has placed on one Web site a collection of court pleadings, newspaper clippings, statements, and other materials designed to provide journalists and scholars with information on the lawsuits. Of particular interest are the reports of expert witnesses who prepared testimony in defense of the university's affirmative action plans. Among those whose testimony is reproduced on the Web page are William Bowen and Derek Bok (co-authors of THE SHAPE OF THE RIVER), Professor Thomas Sugrue of the University of Pennsylvania, Professor Patricia Gurin of the University of Michigan, and Professor Eric Foner of Columbia University. These expert reports constitute an extraordinary treasure trove of material on the "diversity" rationale, probably the most useful collection of material available in one place anywhere.

B. AFFIRMATIVE ACTION: LEGAL PRINCIPLES

1. ***The issue in a nutshell:*** By "affirmative action," I mean race-based preferences in admission and financial aid. I do not mean affirmative action on other bases (gender, disability, etc.), or non-preferential affirmative action programs such as augmented recruiting and outreach efforts. Nor do I cover in this outline two other forms of affirmative action: hiring programs for faculty and staff, and minority business preferences undertaken by an institution of higher education in its role as a contractor. An affirmative action program, in the narrow sense in which the term is used in this outline (and the narrow sense in which the term has become highly charged politically and emotionally in the higher education community), is a program that gives a preference to minority applicants for admission solely on the basis of their race.[1]

[1] For those interested in a non-technical definition of affirmative action, I like this one: "Affirmative action consists of institutionalized policies, procedures, and programs designed and implemented to ensure the eradication of past negative actions through which certain citizens were denied equal opportunity for full participation and success in all U.S. societal institutions. Affirmative action is an intentional good-faith effort to reverse the ills of the past." Harold Cheatham, CULTURAL PLURALISM ON CAMPUS 11 *(1991), quoted in* Yollander Hardaway, *Affirmative Action: Does the Fifth Circuit's* Hopwood *Ruling Place Affirmative Action on Shaky Grounds?*, 83 ED. L. RPTR. 1089, 1090 (1998).
[Footnote continued on next page.]

It is an unavoidable fact of life in contemporary American higher education that, without racial preferences, racial diversity would suffer at selective colleges and universities. But preferences are legally problematic. In a prescient passage anticipating much of today's debate over preferential affirmative action programs, Justice Powell in his opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 298 (1978), observed:

> [T]here are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. ... Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. Third, there is a measure of inequity in forcing innocent persons ... to bear the burdens of redressing grievances not of their making.

2. ***Starting Point for Analysis: The "Strict Scrutiny" Standard.*** Under Title VI of the 1964 Civil Rights Act, universities are prohibited from discriminating on the basis of race, color, or national origin in the operation of their programs and activities. In a series of decisions over the past two decades, the Supreme Court has placed a heavy burden on institutions whose affirmative action programs are challenged under Title VI. Such programs, the Court has ruled, are inherently suspect because of their reliance on racial characteristics as decisional determinants; and, because they are inherently suspect, courts will subject them to a very demanding standard of proof -- the so-called "strict scrutiny' standard -- when they are challenged on constitutional or Title VI grounds.

Under the "strict scrutiny" standard, a program that relies on race-based preferences is illegal unless the institution can demonstrate that:

- The program serves a *compelling institutional interest,* and
- The program is *narrowly tailored* to further that compelling interest.

3. ***Compelling Institutional Interest.***

(a) Starting with *Bakke,* and with consistency since then, the courts have recognized two justifications for affirmative action programs that are suitably compelling to satisfy the first prong of the two-part "strict scrutiny" test:

(i) *Remedying the present effects of past discrimination.* If unlawful discrimination against African-Americans actually occurred (for example, if the institution had a written policy excluding them from applying or making them ineligible for hire), then

a remedial affirmative action program serves the compelling institutional interest in removing the lingering vestiges of past discrimination.

(ii) *Diversity.* An affirmative action program serves a compelling purpose if it is designed to foster racial diversity in the student body or the workforce.

(b) Before turning to a discussion of these two compelling institutional interests, it is worth pausing to consider the large number of purportedly "compelling" justifications for affirmative action that have been offered by colleges and universities over the years only to be roundly rejected by the courts. In *Hopwood v. Texas*, 861 F. Supp. 551 (W. D. Tex. 1994), *rev'd and remanded*, 78 F. 3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), discussed in more detail on page 12 of this outline, below, the admissions committee at the University of Texas Law School asserted that its affirmative action program was designed to serve five compelling purposes: diversity; remedying the present effects of decades of formal discrimination against African-American and Hispanic candidates for admission; and three others:

- "[P]roviding a first class legal education to future leaders of the bench and bar of the state by offering real opportunities for admission to members of the two largest minority groups in Texas, Mexican Americans and African Americans";

- "To achieve compliance with the American Bar Association and the American Association of Law Schools standards of commitment to pluralistic diversity in the law school's student population"; and

- To honor the terms of a consent decree entered against the State of Texas in 1983 in a longstanding administrative enforcement proceeding brought by the United States Department of Education's Office for Civil Rights to desegregate the dual public higher education system in Texas.

The trial court in *Hopwood*, citing *Bakke*, rejected those three purported justifications: "Although all are important and laudable goals, the law school's efforts, to be consistent with the [Constitution], must be limited to seeking the educational benefits that flow from having a diverse student body and to addressing the present effects of past discriminatory practices." 861 F. Supp. at 570.[2]

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[2] I cannot resist reflecting on the irony of the court's ruling that *compliance with an OCR consent decree* is an insufficiently compelling justification for an affirmative action program. In the 1970's and '80's, many state universities, including the Universities of Texas and Maryland, were either sued by the Department of Health, Education and Welfare or subjected to administrative enforcement proceedings in a coordinated federal effort to dismantle segregated higher education systems. Many of the affirmative action programs that were subsequently challenged in reverse-discrimination lawsuits -- including the [Footnote continued on next page.]

(c) *Remedying the present effects of past discrimination.* To paraphrase slightly the Supreme Court's holding in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492-93 (1989): if a university establishes its former participation in a systematic program of racial exclusion by making "some showing of prior discrimination," then the university may legally take "affirmative steps to dismantle such a system." But that standard comes with a warning: courts are required to make "searching judicial inquiry into the justification for such race-based measures... [and to] identify that discrimination... with some specificity before they may use race-conscious relief."

An institution satisfies that heightened standard of evidentiary proof by invoking "judicial, legislative, or administrative findings of constitutional or statutory violations...." *Croson, supra,* 488 U.S. at 497. In some states, predominantly southern and border states that operated legally segregated, dual systems of public higher education in the 1960's and 1970's,[3] public institutions of higher education can satisfy that burden by pointing to judicial and administrative determinations that their state higher education systems formally operated dual higher education systems that were racially segregated by operation of state law.

For private institutions and institutions outside the south, the chances of sustaining an affirmative action program in the admissions office by pointing to the compelling interest in remedying the present effects of past discrimination are dubious at best. *See generally* A. Baida, *Not All Minority Scholarships Are Created Equal: Why Some May Be More Constitutional Than Others,* 18 J. COL. & Univ. L. 333, 342-49 (1992).

(d) *Diversity.* The starting point for analysis is Justice Powell's detailed treatment of the issue in *Bakke*.[4] "[T]he attainment of a diverse student body," he wrote, "...clearly is a

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admissions program in *Hopwood* -- were instituted in response to intense federal advocacy for those programs.

[3] Nineteen states are covered by so-called *Adams* decrees, named after the lawsuit filed by the U.S. Department of Health, Education, and Welfare shortly after the enactment of Title VI in 1964. *See Adams v. Richardson,* 356 F. Supp. 92 (D.D.C. 1973), *modified,* 480 F. 2d 1159 (D.C. Cir. 1973) (en banc). In *Adams* and successor cases, HEW obtained judicial orders requiring states to dismantle racially separate higher education systems. As part of court-approved desegregation plans, HEW's Office for Civil Rights insisted upon the remedial measures -- affirmative action plans in admission, race-restricted financial aid programs -- that are now under attack in reverse-discrimination lawsuits such as *Hopwood.*

[4] Over the years, the lower federal courts have regarded Justice Powell's discussion of diversity in *Bakke* as something approaching a definitive pronouncement on the issue. *See, e.g., Davis v. Halpern,* 768 F. Supp. 968 (S.D.N.Y. 1991). Nevertheless, it is worth remembering that the portion of Justice Powell's opinion dealing with diversity commanded the support of no other Justice on the Supreme Court, and there is considerable question in the minds of legal commentators whether today's Supreme Court would [Footnote continued on next page.]

constitutionally permissible goal for an institution of higher education." Quoting from two of the Court's landmark decisions on academic freedom, Justice Powell observed that "... [i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.... The atmosphere of speculation, experiment and creation -- so essential to the quality of higher education -- is widely believed to be promoted by a diverse student body. ... [I]t is not too much to say that the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." 438 U.S. at 311-313, *quoting Sweezy v. New Hampshire,* 354 U.S. 234, 263 (1957), *and Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967).

Justice Powell's opinion cites and quotes from an extraordinary essay written in 1977 by Princeton President William Bowen entitled "Admissions and the Relevance of Race." Almost two decades later, this essay remains one of the most lucid descriptions ever written of the pedagogical underpinnings for the ideal of diversity in American higher education. From that essay:

> [T]he overall quality of the educational program is affected not only by the academic and personal qualities of the individual students who are enrolled, but also by the characteristics of the entire group of students who share a common educational experience. ... In a residential college setting, in particular, a great deal of learning occurs informally[,] ... through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. ... People do not learn very much when they are surrounded only by the likes of themselves.
>
> It follows that if, say, two thousand individuals are to be offered places in an entering undergraduate class, the task of the Admission Office is not simply to decide which applicants offer the strongest credentials as separate candidates for the college; the task, rather, is to assemble a total class of students, all of whom will possess the basic qualifications, but who will also represent, in their totality, an interesting and diverse amalgam of individuals who will contribute through their diversity to the quality and vitality of the overall educational environment. ...

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endorse the notion that affirmative action could ever be justified except as a remedial measure following an explicit finding that it is necessary in order to remedy the lingering effects of past discrimination. *See* Walter Dellinger, "Memorandum to General Counsels -- *Adarand,"* U.S. Dep't of Justice, Office of Legal Counsel, June 28, 1995, pp. 14-19.

> In the nature of things it is hard to know how, and when, and even if, this informal "learning through diversity" actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth.
>
> It is of course true -- and it should be recognized -- that the presence on campus of students of different races sometimes results in tensions and even in hostility. But it is also true that acknowledging this reality, and learning to cope with it, can be profoundly educational. In this as in other respects, we often learn at least as much from our bad days as from our good days. ...
>
> These kinds of learning experiences, sometimes very satisfying and sometimes very painful, are important not only for particular students in an immediate sense but also for the entire society over time. Our society -- indeed our world -- is and will be multiracial. We simply must learn to work more effectively and more sensitively with individuals of other races, and a diverse student body can contribute directly to the achievement of this end. One of the special advantages of a residential college is that it provides unusually good opportunities to learn about other people and their perspectives -- better opportunities than many will ever know again. If people of different races are not able to learn together in this kind of setting, and to learn about each other as they study common subjects, share experiences, and debate the most fundamental questions, we shall have lost an important opportunity to contribute to a healthier society .... [Pp. 426-29.]

Affirmative action critics, not surprisingly, disagree about the educational and social value of diversity. From Shelby Steele's book THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA (1990), pp. 115-16:

> *Diversity* is a term that applies democratic principles to races and cultures rather than to citizens, despite the fact that there is nothing to indicate that real diversity is the same thing as proportionate representation. Too often the results of this on campuses ... has been a democracy of colors rather than of people, an artificial diversity that gives the appearance of an educational parity between black and white students that has not yet been achieved in reality. Here again, racial preferences allow society to leapfrog over the difficult problem of developing blacks to parity with whites and into a cosmetic diversity that covers the blemish of disparity -- a full six years after admission, only about 26 percent of black students graduate from college. ...

> I think that one of the most troubling effects of racial preferences for blacks is the kind of demoralization, or put another way, an enlargement of self-doubt. Under affirmative action the quality that earns us preferential treatment is an implied inferiority. However this inferiority is explained -- and it is easily enough explained by the myriad deprivations that grew out of oppression -- it is still inferiority. There are explanations, and then there is the fact. And the fact must be borne by the individual as a condition apart from the explanation, apart even from the fact that others like himself also bear this condition. In integrated situations where blacks must compete with whites who may be better prepared, these explanations may quickly wear thin and expose the individual to racial as well as personal self-doubt.

4. ***"Narrowly Tailored."*** The second part of the two-part "strict scrutiny" standard requires the university to prove that its affirmative action program has been designed and implemented in the narrowest way possible consistent with the compelling purposes the program is designed to serve. The program cannot be broader, more encompassing, or more ambitious than the minimum required to achieve its goal; otherwise, say the courts, the legal rights of innocent third parties may be trammeled.

The first part of the two-part "strict scrutiny" test -- articulating the "compelling institutional interest" served by affirmative action -- focuses on the lofty objectives of affirmative action. The second part -- whether the program is "narrowly tailored" -- focuses on the nitty-gritty details of specific affirmative action programs.

In practical terms, the second part of the "strict scrutiny" test requires the university to make the following showings with respect to the *mechanical details* of its affirmative action program:

(a) The institution must show that it considered and rejected *alternative program designs* with a narrower focus. Justice Powell's opinion in *Bakke* is again instructive. The affirmative action program used by the admissions office at U.C. Davis Medical School was a thinly veiled quota program, under which a specific number of seats in the entering class was rigidly reserved for minority applicants. Justice Powell accepted the notion that a race-conscious affirmative action program *of some sort* was warranted by the goal of achieving a racially diverse class, then asked whether a quota program was "the only effective means" of achieving diversity. No, he concluded:

> [T]he nature of the state interest that would justify consideration of race or ethnic background ... is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is

> but a single though important element. [The University's] special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity. [438 U.S. at 315.]

Justice Powell then turned to "[t]he experience of other university admissions programs," which demonstrate that race can be taken into account without "assigning ... a fixed number of places to a minority group....." His opinion quotes at length from a description of the affirmative action program utilized by the undergraduate admissions office at Harvard College. The complete written description of the Harvard program is appended to the Powell opinion. Under the Harvard program, as paraphrased by Justice Powell in the most widely quoted paragraph in his opinion:

> ... [R]ace or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. [438 U.S. at 316, 317.]

In sum: Justice Powell's opinion, and in particular his endorsement of the Harvard model of affirmative action, have been interpreted by the lower federal courts to mean that *the use of numerical quotas is absolutely, unambiguously prohibited.* An affirmative action program that reserves seats for minorities will never pass legal muster. Even the use of flexible goals raises potential problems if the record shows that the goals are reached so regularly and so immutably that they function as the equivalent of quotas.

(b) It implement the program for *a limited period of time* (in other words, the program must "sunset" after a certain number of years). Affirmative action is supposed to be a means to an end, namely inclusiveness without regard to non-performance-related criteria such as race. The university can partially protect itself against legal attack, therefore, if it (i) specifically recites that the affirmative action program is not indefinite in duration, and (ii) regularly reviews the program, adjusts its operations, and evaluates its efficacy.

(c) *The program does not unreasonably diminish the rights of third parties.* An affirmative action program must be designed to ensure that every applicant's file is compared to every other

applicant's file. Courts have uniformly invalidated programs that exhibit any of the following features:

- The files of all minority applicants are placed in a single batch or pool;
- The admissions committee uses a separate subcommittee to review minority files only;
- The admissions committee employs separate admissions standards for minority and non-minority applicants.

These prohibited practices have one common characteristic: they bifurcate the admissions process by creating a discrete "path" for consideration or evaluation of minority applicants. One of the strong themes to emerge from affirmative action jurisprudence during the last decade is that the qualifications of every applicant, regardless of race, must be evaluated against the qualifications of every other applicant to ensure that race, in and of itself, is not the sole determinant in the admission process. Any departure from that principle -- any suggestion that minority applicants benefit from a standard or procedure not provided routinely to the applicant pool as a whole -- imperils the program.

5. ***Conclusion:***

(a) To withstand legal scrutiny, admissions and hiring programs operated by universities must be supported by a compelling justification. Given the state of the law today, it is next to impossible for a university to sustain that burden by relying on the so-called *remedial* justification for affirmative action. *Fostering student-body diversity* may be the only avenue that offers much chance of withstanding judicial assault. Universities seeking to justify their affirmative action programs on other grounds have been singularly unsuccessful over the years.

(b) If the program is warranted by a compelling institutional justification, it still must be narrowly tailored to serve that justification without trammeling the rights in uninvolved third parties. This means as a practical matter that (i) quotas are absolutely taboo, (ii) programs should not be perpetual and should be reevaluated periodically, and (iii) admissions offices should not use discrete tracks or paths for minority applications.

C. THE 1990'S AND THE GRADUAL EROSION OF THE "DIVERSITY" RATIONALE"

1. ***The Attack on Affirmative Action in the Courts.***

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(a) **The Hopwood *Decision***. The 1996 decision of the Fifth Circuit Court of Appeals in *Hopwood v. Texas*, 78 F. 3d 932, *cert. denied*, 518 U.S. 1033 (1996), marked a startling departure in affirmative action law. Like Alan Bakke before her, Cheryl Hopwood was a white applicant denied admission to a state-supported professional school -- the law school at the University of Texas. Hopwood's undergraduate grade-point average and standardized test scores were higher than those of African-American and Mexican-American applicants whom the law school accepted under its race-based affirmative action program. Hopwood and other unsuccessful white applicants sued for reverse discrimination. At trial, the judge found that the law school's affirmative action program was necessary both to remedy present effects of decades of formal discrimination against minorities and to foster diversity in the law school's student body. The trial court held that Texas's affirmative action plan was in most respects narrowly tailored to serve those compelling interests, although the court ruled that the use of a separate subcommittee to evaluate minority applicants was unconstitutional and ordered the State of Texas to pay Hopwood one dollar in nominal damages.

Hopwood appealed. The Fifth Circuit decision, rendered March 18, 1996, sent shock waves through the higher education community. The court reversed the trial court and held that the University of Texas Law School violated the law by using an affirmative action program that relied *even in part* on race as an admission criterion. The court took the unusual step of suggesting that Justice Powell's decision in *Bakke* was no longer controlling law (due to the accretion of anti-affirmative-action Supreme Court decisions over the last decade), and that, with *Bakke* essentially overruled, diversity was no longer a sufficiently compelling justification for race-based affirmative action.

(b) ***Taxman v. Board of Education of the Township of Piscataway***, 91 F. 3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 521 U.S. 1117 (1997).[5] In 1975, the board of education adopted an affirmative action plan that allowed race-based exceptions to strict seniority protection against layoffs. In 1989, the board had to choose between two teachers with equal seniority -- Sharon Taxman (who is white) and Debra Williams (who is African-American) -- when one position was to be eliminated. On the basis of race, the board selected Taxman for layoff. She sued. The record showed clearly that the board of education justified its minority preference on classical "diversity" grounds; when asked at trial to explain its educational objective, the board president answered:

[5] A few months after the Supreme Court agreed to hear the *Taxman* appeal, the parties agreed to an extraordinary out-of-court settlement under which a coalition of civil rights groups (not parties to the litigation) agreed to pay approximately $400,000 in damages and attorneys' fees to Ms. Taxman and her counsel. The Supreme Court subsequently dismissed the petition for certiorari because of the settlement. *Settlement Prevents Supreme Court From Hearing Key Affirmative-Action Case*, CHRON. OF HIGHER ED., December 5, 1997, p. A48.

> In my own personal perspective I believe by retaining Mrs. Williams [the board] was sending a very clear message that we feel that our staff should be culturally diverse, our student population is culturally diverse and there is a distinct advantage to students, to all students, to ... come into contact with people of different cultures, different backgrounds, so that they are more aware, more tolerant, more accepting, more understanding of people of all backgrounds.

(Quoted in *Taxman*, 91 F. 3d at 1552.) This was not enough for the Third Circuit, which struck down the board's affirmative action plan and ordered Ms. Taxman reinstated to her teaching position. Citing *Hopwood* with approval, the court declared, "Although we applaud the goal of racial diversity, we cannot agree that Title VII permits an employer to advance that goal through non-remedial discriminatory measures." *Id.* at 1567. The court also held that the plan was not narrowly tailored to serve any lawful purpose:

> We begin by noting the policy's utter lack of definition and structure. ... The affirmative action plans that have met with the Supreme Court's approval under Title VII had objectives, as well as benchmarks which served to evaluate progress, guide the employment decisions at issue and assure the grant of only those minority preferences necessary to further the plans' purpose. By contrast, the Board's policy, devoid of goals and standards, is governed entirely by the Board's whim .... Moreover, both *Weber* and *Johnson* unequivocally provide that valid affirmative action plans are "temporary" measures that seek to "'attain'", not "maintain" a "permanent ... racial balance." The Board's policy, adopted in 1975, is an established fixture of unlimited duration.

(*Id.* at 1564 [citations omitted].)

(c) ***The* Lutheran Church *Decision***. Two years ago, one of the nation's leading appellate courts decided a case with potentially far-reaching implications for the diversity rationale. In *Lutheran Church, Missouri Synod v. Federal Communications Comm'n*, 141 F. 3d 344 (D.C. Cir. 1998), the NAACP challenged the renewal of two radio station licenses held by a religious organization on the ground that the licensee had not complied with the FCC's equal employment opportunity regulations. Those regulations required (among other things) that licensees adopt affirmative-action "EEO programs" to increase the representation of minorities and women in the work force. The FCC ruled in the NAACP's favor. In a unanimous and sharply worded decision, a three-judge panel reversed the FCC order and struck down the Commission's EEO-program regulation on the ground that the proffered justification -- promotion of diverse viewpoints in the broadcast industry -- was insufficiently compelling to satisfy strict scrutiny. To the consternation of affirmative-action advocates, the court quoted with approval from the *dissenting* opinion of Justice O'Connor in *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547, 615 (1990): "'[T]he interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race

classifications apart from generalizations impermissibly equating race with thoughts and behavior.'" The court ended with a passage manifesting clear hostility to diversity-based affirmative action:

> Perhaps this is illustrative as to just how much burden the term "diversity" has been asked to bear in the latter part of the 20th century in the United States. It appears to have been coined both as a permanent justification for policies seeking racial proportionality in all walks of life ("affirmative action" has only a temporary remedial connotation) and as a synonym for proportional representation itself. It has, in our view, been used by the Commission in both ways. We therefore conclude that its EEO regulations are unconstitutional and cannot serve as a basis for its decision and order in this case. [141 F. 3d at 356.]

(d) ***The Boston Latin Decision***. The Boston Latin School is one of three public high schools in the city Boston to which students must apply by taking a written examination. The 90 available openings in the ninth-grade class were divided into two groups of 45 seats. One group of 45 was selected strictly on the basis of examination score and junior high school grade point average. The 45 other seats were allocated on the basis of "flexible racial/ethnic guidelines," using a procedure that essentially strove to admit students in designated racial groups (black, Hispanic, Asian, and Native American) in proportion to their representation in the qualified applicant pool. Sarah Wessman, a white applicant, was passed over for admission in favor of minority candidates with lower test scores and GPAs, and she sued.

In a lengthy opinion, the First Circuit Court of Appeals ruled that Boston Latin's admission procedure was not *narrowly tailored* and therefore violated the civil rights of white applicants by discriminating against them on the basis of their race. *Wessman v. Gittens*, 160 F. 3d 790 (1st Cir. 1998). The court went to considerable pains *not* to denigrate diversity as a potentially compelling justification for race-conscious affirmative action:

> In considering whether other governmental interests, beyond the need to heal the vestiges of past discrimination, may be sufficiently compelling to justify race-based initiatives, courts occasionally mention "diversity." At first blush, it appears that a negative consensus may be emerging on this point [citing, among other cases, *Hopwood* and *Lutheran Church*]. ... [But] [w]e think that any such consensus is more apparent than real. ... It may be that the Hopwood panel is correct and that, were the [Supreme] Court to address the question today, it would hold that diversity is not a sufficiently compelling interest to justify a race-based classification. *It has not done so yet, however,* and we are not prepared to make such a declaration in the absence of a clear signal that we should. ... [W]e assume arguendo – but we do not decide -- that Bakke remains good law and that some iterations of "diversity" might be sufficiently compelling, in specific

> circumstances, to justify race-conscious actions. [160 F. 3d at 795, 796 (emphasis added).]

But, continued the court in the most important part of its decision, *proof* of the educational value of diversity was not proffered by the Boston School Committee in this case. Instead, the School Committee offered only "generalities" and "abstractions" about the essential link between diversity and the modern learning experience. *Id.* at 797. "The School Committee has provided absolutely no competent evidence that the proportional representation promoted by the Policy is in any way tied to the vigorous exchange of ideas ... [or] students' capacity and willingness to learn. To the contrary, the School Committee relies only on broad generalizations by a few witnesses, which, in the absence of solid and compelling evidence, constitute no more than rank speculation." *Id.* at 799-800.

(e) ***Post*-Hopwood *Litigation***. Several lawsuits recently filed by affirmative action opponents seek to broaden the scope of the *Hopwood* holding and invite long-awaited Supreme Court review.

(i) *The University of Georgia Litigation*. In March, 1997, a group of unsuccessful white applicants for admission to the University of Georgia filed suit on the ground that the university's "dual track" admission system – utilized since 1990 but replaced in 1995 by a different system – discriminated against them on the basis of their race. Under the system in use between 1990 and 1995, black applicants received automatic admission if they achieved a combined score of 800 on the SAT coupled with a 2.0 high school grade point average; white applicants were admitted automatically only upon achieving an SAT score of 980 and a 2.5 high-school GPA. In early 1999, the trial judge ruled in the plaintiffs' favor and invalidated the (already replaced) affirmative action plan that had been in effect between 1990 and 1995. The judge's ruling was based on the relatively narrow ground that the university, by operating a "dual track" program, had not operated its program in a fashion that was *narrowly tailored* to serve the institution's interest in diversity. Even so, the judge grumbled and betrayed considerable skepticism about the continued vitality of the diversity rationale:

> Although the Court recognizes the theoretical benefit of an educational setting which is open to a diverse collection of viewpoints, it is not convinced that these benefits – furthered here only in an abstract sense – justify outright discriminatory admission practices which cause concrete constitutional injuries.

Wooden v. Board of Regents of the University System of Georgia, 32 F. Supp. 2d 1370, 1380 (S.D. Ga. 1999).

Six months later, in July, 1999, the same trial judge issued a second decision in the University of Georgia litigation. The plaintiff in the second case had applied in 1997 under the admission program that replaced the one discontinued in 1995, and that plaintiff, too, had not been admitted. The judge dismissed the plaintiff's lawsuit on narrow technical grounds related to the plaintiff's standing to bring the suit, but in the process issued a blistering attack on the diversity rationale, leaving no doubt that he viewed diversity as less than a compelling justification for race-conscious affirmative action. Calling diversity "amorphous" and asserting that affirmative action "stigmatizes … non-white students for the sake of a largely symbolic racial preference," the judge criticized the university for "fail[ing] to meaningfully show how [affirmative action] actually fosters educational benefits." *Tracy v. Board of Regents of the University System of Georgia*, 1999 Westlaw 557691 at *7, *8 (S.D. Ga. July 6, 1999).

Courageously, the President of the University of Georgia, Dr. Michael Adams, announced on September 30 that the admissions office would continue to use race as a factor in admitting up to 20 percent of the university's freshman class. "I believe that all of us have a responsibility to deal with the legacy of segregation as an issue in both academe and government," Dr. Adams was quoted as saying in a speech that received a standing ovation from faculty members, administrators and students. "My commitment to providing opportunity to all is fundamental, and under my leadership the University of Georgia will remain committed to this basic right." *University Stands Firm In Using Race In Admissions*, NEW YORK TIMES, October 1, 1999, page A14.

(ii) At almost the same time, the same lawyers who represented the plaintiffs in *Hopwood* filed another lawsuit against the University of Washington Law School. In their lawsuit, they allege that differential admission standards for white and minority applicants violate the constitutional and statutory rights of whites. *See New Lawsuits May Help Decide Legality of Affirmative Action*, CHRON. OF HIGHER ED., March 21, 1997, page A34.

(iii) Recently, the lawyers behind *Hopwood* filed two more lawsuits, both against the University of Michigan. One challenges the affirmative action plan used by the law school admissions office, and the other challenges affirmative action in undergraduate admissions. *See Suit Challenges Affirmative Action in Admissions at U. of Michigan*, CHRON. OF HIGHER ED., October 24, 1997, page A27; *U. of Michigan Faces 2nd Lawsuit Over Use of Race in Admissions*, CHRON. OF HIGHER ED., December 12, 1997, page A32.

2. ***The Assault on Affirmative Action in California's Public Institutions of Higher Education***. Two major developments have roiled the college and university community in California over the last several years.

(a) In July, 1995, a closely divided University of California Board of Regents voted to end racial preferences in hiring, contracting, and admissions at the University of California. *University of California Ends Race-Based Hirings, Admissions*, CHRON. OF HIGHER ED., July 28, 1995, page A26. The vote came one month after California Governor Pete Wilson -- then a candidate for the Republican Presidential nomination -- issued an executive order that ended race-based affirmative action in state hiring and contracting programs.

(b) In November, 1996, the voters of California approved Proposition 209, a state ballot referendum that amends the state constitution to prohibit the use of race-based or sex-based preferences by state and local government agencies, including the University of California, the California State University System, and California's enormous community college system.[6] Almost immediately, the American Civil Liberties Union and other proponents of affirmative action brought suit and obtained a temporary restraining order prohibiting the University of California System from taking any anti-affirmative-action measures purportedly necessitated by the enactment of Proposition 209. *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996). In January, 1997, officials at the University of California announced that they would continue to consider

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[6] The text of Proposition 209 reads in pertinent part as follows:

> "(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> ...
>
> "(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.
>
> "(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain any federal program, where ineligibility would result in a loss of federal funds to the state.
>
> "(f) For the purposes of this section, 'state' shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state."

The text of Proposition 209 and interpretive information on its effect and significance are available from two on-line sources. One is the official Web page of the California Civil Rights Initiative, the organization that sponsored Proposition 209. Its page can be found at http://www.publicaffairsweb.com/ccri. The other is the Web page of Californians for Justice, one of many grass-roots organizations that opposed Proposition 209. Its page can be found at http://www.igc.apc.org/cfj.

race and ethnicity in making admissions decisions for the Classes of '01 at all UC campuses pending the outcome of the ACLU challenge to Proposition 209. *With Suits Pending, U. of Cal. to Consider Race in Admissions*, CHRON. OF HIGHER ED., January 10, 1997, page A30.

But a few months later, the Ninth Circuit Court of Appeals lifted the temporary restraining order and held that Proposition 209 was constitutional and enforceable. *Coalition for Economic Equity v. Wilson*, 110 F. 3d 1431 (9th Cir. 1997). In August, 1997, just as the new academic year was beginning, the foes of Proposition 209 filed an emergency motion to stay the Ninth Circuit mandate pending petition to the United States Supreme Court, but that request for emergency relief was denied on August 26, 1997. *Coalition for Economic Equity v. Wilson*, 122 F. 3d 718 (9th Cir. 1997). In the 1997-98 admission cycle, the University of California selected entering freshman classes without regard to race and ethnicity. The predictable result: the number of admitted minority students dropped by 55 percent at the Berkeley campus, 36 percent at the Los Angeles campus, and 19 to 36 percent on other UC campuses.[7] *Berkeley and UCLA See Sharp Drops in Acceptance of Black and Hispanic Applicants*, CHRON. OF HIGHER ED., April 10, 1998, page A43; *Minority Admissions Fall on 3 U. of California Campuses*, CHRON. OF HIGHER ED., March 27, 1998, page A41.

3. ***The Assault on Affirmative Action in Texas and Adjoining States.*** The Fifth Circuit decision in *Hopwood* led to confusion among colleges and universities in the three-state area comprising that Circuit (Texas, Louisiana, and Mississippi).

On February 5, 1997, the Attorney General of Texas, Dan Morales, issued a Letter Opinion to the Chancellor of the University of Houston System in which he advised that, in light of *Hopwood*'s rejection of the diversity rationale, any consideration of race or ethnicity by colleges and universities was unlawful in the absence of evidence of present effects of past *de jure* race discrimination. General Morales's Letter Opinion predictably cast a pall over a wide range of affirmative action plans in colleges and universities in those states. *Texas Attorney General Bars Affirmative Action at Colleges*, CHRON. OF HIGHER ED., February 14, 1997, page A32.

On March 24, 1997, Norma Cantú, Assistant Secretary for Civil Rights in the United States Department of Education, wrote to General Morales and suggested that his interpretation of *Hopwood* was too broad: "We believe that the *Hopwood* decision is limited to its facts .... [*Hopwood*] concerned the University of Texas Law School's affirmative action program, and

[7] "Minority" encompasses African-American, Hispanic-American, and Native American applicants. The number of Asian-American admittees rose slightly at Berkeley and remained the same on other UC campuses.

should not be used to invalidate the affirmative action admission program[s] used by [other institutions] to assist in creating a diverse student enrollment for educational purposes."

Ms. Cantú's letter prompted expressions of disagreement from legal analysts in Texas and predictable ridicule from the law firm that represented the plaintiffs in *Hopwood*. "In studying both the Fifth Circuit opinion and the Attorney General's advisory opinion, I think [*Hopwood*] has a broader application than simply at the law school at U.T.-Austin," said Ray Farabee, General Counsel of the University of Texas System. Added Michael Greve, executive director of the law firm representing the *Hopwood* plaintiffs: "If Ms. Cantú were in the private sector and wrote a letter like that to one of her clients, there is ironclad cause for legal malpractice." (Both quotations are from *Texas Colleges Need Not Follow Ruling on Affirmative Action, U.S. Official Says*, CHRON. OF HIGHER ED., March 28, 1997, page A41.)

When the furor did not die down, the Department of Education reversed itself. In a letter to Texas State Senator Rodney Ellis written April 11, Ms. Cantú wrote that, absent further review, *Hopwood* prohibits race-conscious affirmative action for the purpose of fostering student body diversity. "In Shift, U.S. Tells Texas It Can't Ignore Court Ruling Barring Bias in College Admissions," N.Y. TIMES, April 15, 1997, p. A20.

4. ***Summary***:

(a) The diversity rationale hangs by a thread. Even those judges who are willing to acknowledge its continued vitality do so grudgingly and in a qualified way; and many judges are ready and willing to proclaim that *Bakke* is no longer good law and diversity is no long sufficiently compelling to satisfy strict scrutiny.

(b) It is clearly not enough for proponents of affirmative action to rely on unsupported assertions that diversity serves positive educational purposes. Judges are quick to dismiss such assertions as abstractions. Judges want "compelling evidence," in the words of the court in *Wessman*, not "rank speculation." The bar has been raised. The onus is on the institutional defenders of affirmative action to prove convincingly – to skeptical judges – that diversity is essential to the achievement of higher education's mission.

D. SOCIAL SCIENCE RESPONDS

1. *Diversity Resurrected? The Bowen-Bok Book*. In September, 1998, Princeton University Press published THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS. The book, written by former Princeton President William G. Bowen and former Harvard President Derek Bok, was immediately hailed by proponents of affirmative action: "With its rich database and carefully calibrated tone, the study will most likely lead the charge in a liberal counteroffensive to recast the

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debate over affirmative action ...." "Study Strongly Supports Affirmative Action in Admissions to Elite Colleges." *New York Times*, September 9, 1998.

The book is essentially a longitudinal study of three cohorts of college matriculants, one entering college in 1951, one in 1976, and one in 1989. Altogether, the study tracked more than 80,000 undergraduate students at 28 of the nation's most selective colleges and universities.[8] The book uses statistics, economics, and sociology in an effort to develop a quantifiable factual basis for measuring the societal effects of affirmative action in admission to elite colleges and universities. The authors used their formidable database to pose and analyze the most vexing questions surrounding the use of affirmative action by admissions offices:

(a) *Do students benefit from attending an institution with a racially diverse student body*? "The ultimate test of diversity as an educational policy ... is ... what students think of their total experience after traveling the sometimes bumpy road toward greater tolerance and understanding. ... Of the many thousands of former matriculants who responded to our survey, the vast majority believe that going to college with a diverse body of fellow students made a valuable contribution to their education and personal development. There is overwhelming support for the proposition that the progress made over the last thirty years in achieving greater diversity is to be prized, not devalued." (Page 255.)

(b) *Does society benefit*? One of the study's most compelling findings is that affirmative action in college admission -- which is still barely two generations old in the United States -- has already contributed to the emergence of a stable African-American middle class. "By any standard, ... the achievements of the black matriculants [in the study] have been impressive." (Page 258.) Income levels, college graduation rates, percentages with advanced degrees, and other measures of academic and professional success are equivalent for black and white matriculants.

(c) *Does affirmative action stigmatize its intended beneficiaries*? No, concludes the Bowen-Bok study. There is no evidence that minority students admitted through affirmative action programs graduate at different rates, perform differently than non-minorities in graduate school, or have job histories that are perceptibly different.

(d) *Is affirmative action fair to non-minorities*?

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[8] Students came from eleven private liberal-arts colleges (Barnard, Bryn Mawr, Denison, Hamilton, Kenyon, Oberlin, Smith, Swarthmore, Wellesley, Wesleyan, and Williams) and seventeen public and private research universities (Columbia, Duke, Emory, Miami of Ohio, Michigan, North Carolina, Northwestern, Penn, Penn State, Princeton, Rice, Stanford, Tufts, Tulane, Vanderbilt, Washington University St. Louis, and Yale).

> [E]ven if white students filled all the places created by reducing black enrollment, the overall white probability of admission would rise by only one and one-half percentage points,: from 25 percent to roughly 26.5 percent. Thus, nearly as many white applicants -- including an appreciable number of valedictorians and other highly talented people -- would still have been disappointed. [One educator] has used the analogy of handicapped parking spaces: "Eliminating the reserved space would have only a minuscule effect on parking options for non-disabled drivers. But the sight of the open space will frustrate many passing motorists who are looking for a space. Many are likely to believe that they would now be parked if the space were not reserved." [Pages 36-37.]

(e) *Are there more equitable ways of achieving diversity*? Not, the authors conclude, without either severely reducing the number of admitted minority students or fostering other forms of inequity. (Pages 269-274.) For more on this theme, see the discussion of "The Texas Experiment" on page 24 of this outline, below.

2. *The Harvard-Michigan Law School Study, 1999*. Gary Orfield's Civil Rights Project at Harvard recently undertook an unprecedented examination of student attitudes toward diversity. The task he and his collaborator, Dean Whitla, set for themselves was to determine whether "interracial campuses produce new patterns of discussion and learning." The Orfield-Whitla study – "Diversity and Legal Education: Student Experiences in Leading Law Schools" – reports on the results of high-response polls of a large number of law students at two of the nation's elite law schools, Harvard and the University of Michigan. The study is available on the Web at www.law.harvard.edu/civilrights/publications/lawsurvey.html.

   Using Gallop Poll surveys, Orfield and Whitla posed a series of questions to law students at Harvard and Michigan about classroom and social interactions across racial lines. Almost two thousand students responded to the survey. Among the survey's principal findings:

   (a) Students from the most segregated high-school and college backgrounds were, surprisingly, white students. Almost half the white students came from "highly segregated" educational backgrounds; almost no blacks and Latinos did.

   (b) In many different ways, the study showed that the way students think about problems in the law school classroom are substantially and materially affected through interactions with students of different ethnicity. Here, for example, are two of the pivotal findings from the study:

When asked to make an overall assessment of whether diversity was a positive or negative element in their total educational experience, the result was overwhelmingly positive. Eighty-nine percent of Harvard students and 91% of Michigan students reported a positive impact, the large majority reporting a strongly positive impact. One student explained: "Being confronted with opinions from different socio-economic and ethnic realms forces you to develop logical bases for the opinions you have and to discard those not based on such logic. You simply are forced to think more critically about your opinions when you know that people with differing opinions are going to ask you to explain yourself." Less than 1% of the students at each school reported a negative impact and less than a tenth felt that there was no impact. In public opinion research it is very rare to find majorities of this size on any controversial issue.

Table 12
"Do you consider having students of different races and ethnicities to be a positive or negative element of your educational experience?" (in %)

	Clearly Positive	Moderately Positive	No Impact	Moderately Negative	Clearly Negative
Harvard Students	69.3	19.9	9.7	0.6	0.2
Michigan Students	73.5	17.0	8.6	0.2	0.2

Understanding the nature of law requires understanding the social and economic conditions in which law is applied. Many laws and court decisions rest on assumptions about such conditions and in many instances it is necessary to understand such conditions (and the differing views about them) in order to evaluate court decisions, statutes, and legal doctrines. Some law school students come to law school with substantial undergraduate training or practical experience on such issues. Others do not. Often these issues are not addressed substantively in law teaching, which tends to be much more about the principles and precedents or deductive models concerning points of law than about the underlying social realities. Educational experiences in discussions that enable students to understand these issues better may be of great value in understanding legal issues and representing clients.

Table 18
"Have discussions with students of different racial and ethnic backgrounds changed your view of conditions in various social and economic institutions?" (in %)

	A Great Deal	Substantially	Significantly	Little	Not at All
Harvard Students	25.1	30.8	22.5	13.7	7.6
Michigan Students	32.0	33.8	19.1	8.9	5.9

(c) Voluntary social segregation remains a major concern of non-minority students:

> A number of students, particularly at Harvard Law School, pointed to self-segregation as a barrier to stronger interaction. In spite of the reports of a great many interracial friendships interactions of many sorts, some felt that there were still social barriers and believed that the law school should provide more leadership on that issue. In spite of some "enormously gratifying experiences" one student said that "Harvard Law School has also been the place where I have seen the most racial segregation in comparison to any place that I have been. I find that very odd." A student who thought "diversity is incredibly important," noted that, "as an undergraduate at Stanford.... relations across racial boundaries were not perfect, but were far better than at Harvard Law School. I think the reason for this was simply that there were more minority students at Stanford...."

(d) Orfield and Whitla concluded:

> It is clear from this survey ... that large majorities [of law school students] have experienced powerful educational experiences from interaction with students of other races. Although the plurality of students believe that not enough has been done to realize these potentials fully, there are many contacts and friendships that have formed across racial and ethnic lines. White students appear to have a particularly enriching experience, since they are by far the most likely to have grown up with little interracial contact. The values affirmed by Justice Powell and by the Harvard admissions officials cited in the *Bakke* decision appear to be operating in the lives of law students today. It is regrettable that the scholarly world has been so slow in studying these changes. Nevertheless, this data clearly affirms the judgements of the courts and the leaders of legal education 35 years ago when they embarked on policies that led to the diversity that most of today's students find so profitable to their legal education and to understanding critical dimensions of their profession.

3. ***An aside: Is there an effective surrogate for race?*** Some widely respected observers have urged that we should abandon explicit reliance on race as a "plus" factor in the admission process and rely instead on so-called "correlatives." See, for example, Hugh B. Price, *Fortifying the Case for Diversity and Affirmative Action*, CHRON. OF HIGHER ED., May 22, 1998, page B4; Donald M. Stewart, *Affirmative Action and the SAT*, TRUSTEESHIP, May, 1998, page 36.

   But research conducted by the Harvard Graduate School of Education challenges the notion that the substitution of race-neutral *surrogates* -- *e.g.*, "economically disadvantaged background," "first-generation college," etc. -- for overt racial criteria can serve the objectives of race-conscious affirmative action without creating legal exposure. In fact, given the demographic reality of this country, where the large majority of people living below the

poverty line are white, reliance on race-neutral surrogates inevitably benefit whites more than minorities. The result is diluted racial diversity -- preferable to no diversity, perhaps, but not what overt reliance on race is capable of producing. "When race-conscious admissions policies are outlawed, the easiest alternative for colleges seeking to admit significant numbers of minorities is to target high-poverty, low-achieving schools, because very few whites attend such schools. But the students from these schools will also be the least likely to succeed in college. It is extremely difficult to identify, using only nonracial criteria, those African-American and Latino applicants most likely to succeed in a selective college, because they are often middle-class students attending more competitive, less impoverished schools." Gary Orfield, *Campus Resegregation and Its Alternatives*, reprinted at www.law.harvard.edu/-civilrights/publications/chilling/orfield.html.

The Texas Experiment. In 1997, partly in reaction to the *Hopwood* decision, the Texas legislature passed a law guaranteeing admission to the University of Texas for all high school seniors in Texas whose grade-point averages placed them in the top ten percent of their class. The state law "open[ed] a door for black and Hispanic students by exploiting the *de facto* segregation in [Texas] schools," many of which enroll close to 100 percent minority students. *Admission Law Changes the Equations for Students and Colleges in Texas*, CHRON. OF HIGHER ED., April 3, 1998, page A29. Preliminary indications are that the number of admitted minority students will increase slightly this year at the University of Texas. But the new admission policy has created other problems. Some critics wonder whether diversity is served if the state's most prestigious public university admits students who may not be academically prepared; are we substituting a retention problem for today's admission problem, wonders one high school guidance counselor in a predominantly black inner-city high school in Texas? There is also the palpable risk of suburban white backlash:

> The reality, of course, is that new admissions policies create new sets of winners and losers. In Texas, this latest plan may leave many white applicants angry once the admission cycle ends. Some of those at the super-competitive Highland Park High School, just north of downtown Dallas, feel that the policy is unfair because it treats all schools the same, even though top seniors there are better prepared than many top seniors elsewhere. [CHRON. OF HIGHER ED., April 3, 1998, page A29.]

Notwithstanding these reservations, "[e]lite public universities across the country are watching Texas to see if it has found a way to foster diversity in the post-affirmative-action climate produced by [*Hopwood*]. The University of California, for one, is studying a proposal to admit automatically the top 4 per cent of seniors from each high school there." *Id.*

E. CONCLUSION: REMEMBER THE STAKES. In 1970, 4.5 percent of African-Americans over the age of 25 had completed four years of college. In 1980 the comparable figure was 8 percent. In 1990 it was almost 12 percent. Scholars suggest that a large part of the increase

in educational attainment rates for African-American is the result of race-conscious affirmative action in admission. Without affirmative action, African-Americans and other minorities would be substantially underrepresented in the college population. Yu, Corrine M., & Taylor, William L., THE RESOURCE: AN AFFIRMATIVE ACTION GUIDE (Citizens' Commission on Civil Rights, 1996), page 9.

At the graduate professional level, there is a direct correlation between minority status and service to the minority community. Research supported by the Robert Wood Johnson Foundation shows that minority health-care providers are more likely than non-minority health-care providers to serve patients who are on Medicaid, are poor, or are members of minority groups. Ending affirmative action in admission to medical, dental, or nursing schools will result in fewer health-care providers who serve the poor and will exacerbate existing inequities in the distribution of health care services. *Affirmative Action at Medical Schools Linked to Minority Health Care*, CHRON. OF HIGHER ED., August 9, 1996, page A33.

Each generation builds on the successes or failures of preceding generations. With affirmative action, the *integration* of American higher education accelerated in the period from 1964 to 1990. Without affirmative action, it is reasonable to predict that the *segregation* of American higher education would accelerate with each generation.